SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 129

CHARLES V. DUFFY, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from the U. S. D. C., District of New Jersey	1	1
Docket entries	1	1
Summons and sheriff's return	3	2
Complaint	4	2
Answer	7	4
Agreed statement of facts	8	4
Exhibit A.—Statement of expenditures	23	13
Findings of fact	27	15
Judgment	31	17
Petition for and order allowing writ of error	33	18
Assignments of error	36	19
Proceedings in U. S. C. C. A., for Third Circuit	38	19
Argument and submission	38	19
Opinion, Davis, J.	39	20
Judgment	44	24
Clerk's certificate	47	25
Writ of certiorari and return	48	26

1 In United States District Court, District of New Jersey

CENTRAL RAILROAD COMPANY OF NEW JERSEY
vs.
CHARLES V. DUFFY, COLLECTOR OF INTERNAL Revenue of the United States for the Fifth District of New Jersey. } At Law.

Docket entries

1920.
June 19. Summons issued.
July 6. Summons and complaint returned, served July 1, and filed.
Aug. 3. Stipulation extending time to answer filed.
" 31. Stipulation extending time to answer filed.
Oct. 26. Answer filed.
1921.
Jan. 4. Notice of trial filed.
Mar. 23. Notice of trial filed.
Apr. 4. Continued for January term.
Aug. 10. Notice of trial filed.
Sep. 12. Continued for April term.
Oct. 17. Notice of trial filed.
Nov. 1. Continued for September term.
1922.
Jan. 4. Notice of trial filed.
" 16. Continued for November term.
Mar. 3. Agreed statement of facts filed.
Mar. 17. Notice of trial field.
2 Apr. 5. Trial before the court. Decision reserved.
" 12. Finding of facts filed.
Apr. 12. Rule for judgment final for plaintiff for $91,812.66 and costs filed.
" 24. Plaintiff's costs taxed at $24.71 and filed.
June 16. Certificate of probable cause filed.
July 20. Assignment of errors filed.
" " Petition for writ of error filed.
" " Order allowing writ of error filed.
" " Citation issued.
" 25. Citation returned, service acknowledged. Copy filed.
" 20. Writ of error issued. Copy filed.

3 In United States District Court

Summons and sheriff's return. Filed July 6, 1920

UNITED STATES OF AMERICA,
District of New Jersey, ss:

The President of the United States of America to Charles V. Duffy, Collector of Internal Revenue of the United States for the Fifth District of New Jersey:

You are summoned to answer the annexed complaint of the Central Railroad Company of New Jersey in an action at law in the District Court of the United States for the District of New Jersey. And take notice that unless you file your answer to said complaint with the clerk of the District Court of the United States for the District of New Jersey, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness the Honorable John Rellstab, judge of said court, at Trenton, this 19th day of June, A. D. nineteen hundred and twenty.

[SEAL.] GEORGE T. CRANMER, *Clerk*,
By R. S. CHEVRIER, *Deputy*.

Served the within summons and complaint upon Charles V. Duffy by delivering to and leaving with Eugene Wilkham (chief clerk) a copy thereof at Newark, in the District of New Jersey, on the 1st day of July, 1920, and at the same time showing him this original with the seal of the court attached and informing him of its contents.

ALBERT BOLLSCHWEILLER,
United States Marshal,
By HARRY S. PROVOST, *Deputy*.

4 In United States District Court

Complaint

[Title omitted.]

To the honorable the judges of the District Court of the United States for the District of New Jersey:

Plaintiff complains of defendant and respectfully represents and says that:

1. Plaintiff is a corporation duly organized and existing under and in accordance with the laws of the State of New Jersey and having its principal office and place of business at Central Railroad Terminal in the city of Jersey City, in the county of Hudson, in the State of New Jersey.

2. Defendant is and was and has been at all times herein mentioned the collector of internal revenue of the United States for the

Fifth District of New Jersey, having his office and official place of residence at Newark, in the county of Essex, in the State of New Jersey.

3. Prior to and on July 15, 1917, defendant, claiming to act as collector as aforesaid, represented to plaintiff that there was lawfully due to the United States and to him as such collector, from defendant, the sum of $152,621.31, claiming and representing that said sum had been lawfully assessed against plaintiff, under
5 and in accordance with Part II of Title I of the act of Congress of September 8, 1916 (39 Stat. 765). And on said June 15, 1917, and prior thereto, defendant demanded that plaintiff pay said sum and every part thereof to defendant, and threatened plaintiff with distraint and with penalties and forfeitures in case such payment should be refused. Wherefore, on said June 15, 1917, but under duress and with protest and to avoid penalties threatened by the defendant, plaintiff paid to defendant, involuntarily and insisting that plaintiff was not lawfully required to make said payment or any part thereof, said sum of $152,621.31.

4. The actual net income of plaintiff for the year which ended with December 31, 1916, in respect of which defendant was lawfully entitled on said June 15, 1917, to demand and to receive payment of a tax at the rate of two per centum of said net income, as provided in said Part II of said Title I of said act, was $4,030,554.45 and no more. Defendant unlawfully added to said $4,030,554.45, the sum of $3,600,511.20, which said addition of $3,600,511.20 was effected by adding to the actual gross income of plaintiff the sum of $1,675,-580.60, which was the amount of certain expenditures made by plaintiff during said year in accordance with certain leases in which the plaintiff is lessee and by also excluding from the lawful deductions from said gross income said sum of $1,675,580.60, all which was expended under said leases in order to retain possession of the leased property and for no other purpose and by also excluding from said lawful deductions the further sum of $249,350.00, which was expended by plaintiffs during said year in order to retain possession of property affected by a mortgage, said $249,350.00 being the interest on the bonds secured by said mortgage. By reason of said unlawful addition to said net income, defendent claimed and exacted said sum of $152,621.31, which was $72,010.22 in excess of the amount of $80,611.09 which defendant, as collector as aforesaid, was lawfully entitled to demand and to receive.

6 5. On or about March 8, 1918, plaintiff duly appealed to the Commissioner of Internal Revenue from and on account of the aforesaid action of defendant and represented to said commissioner that the collection of said $72,010.22, being part of said $152,621.31, was unlawful and claimed and demanded that said sum of $72,010.22 and each and every part thereof should be refunded. No decision upon said appeal has been had or made by said commissioner and such decision has been delayed more than six months from the date of such appeal. No part of said $72,010.22 has been

repaid or refunded to plaintiff by defendant or otherwise and defendant has refused and continues to refuse to repay said $72,010.22 or any part thereof.

6. Plaintiff demands judgment against defendant for $72,010.22, with interest from said June 15, 1917.

WM. A. BARKALOW,
Attorney for Plaintiff.

H. T. NEWCOMB,
Of Counsel.

7 In United States District Court

[Title omitted.]

Answer. Filed October 26, 1920

Defendant, Charles V. Duffy, appearing herein by Elmer H. Geran, United States attorney for the District of New Jersey, answering the complaint of the plaintiff herein, says:

1. Defendant admits the allegations of paragraph 1 of the complaint.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Defendant has not sufficient knowledge or information to form a belief as to the allegations of paragraph 3 of the complaint.

4. Defendant denies paragraph 4 of the complaint.

5. Defendant has not sufficient knowledge or information to form a belief as to the allegations of paragraph 5 of the complaint.

6. Defendant denies that plaintiff is entitled to judgment for $72,010.22, with interest from June 15, 1917.

ELMER H. GERAN,
United States Attorney, District of New Jersey.

8 In United States District Court

[Title omitted.]

Agreed statement of facts. Filed March 3, 1920

The above-named plaintiff, by William A. Barkalow, its attorney, and the above-named defendant, by Elmer H. Geran, United States district attorney for the District of New Jersey, his attorney, hereby stipulate and agree that the following is a statement of all the facts upon which this action depends and that this action shall be submitted to the court for its determination upon this statement of facts, trial by a jury being hereby expressly waived:

1. Plaintiff is, and during the year 1916 was, a corporation, duly organized and existing under and by virtue of the laws of the State

of New Jersey, having its principal office and place of business in the city of Jersey City, in the county of Hudson and State of New Jersey.

2. Defendant is, and during the year 1916 was, the collector of internal revenue of the United States for the Fifth District of New Jersey.

3. During the year 1916 plaintiff was subject to the provisions of Part 2 of Title I of the act of Congress of September 8, 1916, entitled "An act to increase the revenue and for other purposes" (39 Statutes at Large, 765).

4. Plaintiff's gross income for the calendar year ended December 31, 1916, was as follows:

From operations	$34,372,348.34
From rentals	722,375.91
From interest	377,653.06
From dividends	202,448.09
From other sources	179,566.63
Total gross income	35,854,392.03

5. Under and by virtue of the aforesaid act of Congress, plaintiff was entitled to deduct from its aforesaid gross income the following amounts:

Expenses	$23,994,443.95
Loss sustained charged off	225,584.41
Depreciation charged off	1,720,009.95
Interest	2,225,091.67
Taxes, domestic	1,947,273.70
Total	30,112,403.68

6. In addition to said amount of $30,112,403.68, plaintiff expended, under the circumstances hereinafter set forth, during said calendar year 1916, the following amounts:

A. *For additions and betterments to Lehigh and Susquehanna Railroad and branches, $103,496.68*

During the calendar year 1916 plaintiff was in possession of the Lehigh and Susquehanna Railroad and branches, extending generally from Phillipsburg, in the State of New Jersey, to Union Junction, Luzerne County, Pennsylvania, under a lease from the Lehigh Coal and Navigation Company, its owner, dated March 31,
10 1871, as modified by agreements dated May 29, 1883, and June 28, 1887, the provisions of which agreements, so far as they are pertinent to this cause, are as follows:

The term of the lease begins from and after April 1, 1871, and runs for and during the continuance of the charters of the parties thereto and for any renewals of the same, excepting that, as to the Nesquehoning Railroad, one of the branches of the Lehigh and Susquehanna Railroad, it is not to extend beyond the term of nine hundred and ninety-nine years from the 4th of November, 1868,

less one day. The charters of both parties to said agreement are perpetual, but are subject to alteration or repeal by the Legislatures of the States of New Jersey and Pennsylvania, under which States said companies were respectively incorporated.

Under said lease plaintiff is required to well and efficiently operate said railroad and all such extensions and additions as may be made thereto, at its own cost and risk, and to pay to the lessor, for the use of the same, one-third of the gross receipts from the traffic or business of the said railroad and of the extensions thereof and additions thereto, subject to a maximum payment of $2,043,000 and a minimum payment of $1,414,400. Plaintiff is also required to maintain and perpetuate said railroad and branches and to keep and maintain the same in good order and repair and fit for efficient use at its own cost and charges, and to so return and deliver up the demised premises at the termination of the lease, the lease stating that it is the true intent and meaning thereof that the demised premises shall be so worked and maintained by plaintiff as to secure the largest amount of revenue possible therefrom.

In addition, said lease provides that all railroads or rail-
11 ways, with their branches, extensions, sidings, and buildings connected therewith, etc., shall, when and as the same are constructed, become part of the demised premises.

It also contains a provision that, in case of any breach of covenant on the part of the lessee, the lessor may terminate the lease unless the lessee makes compensation within a reasonable time after notice from the lessor.

Said sum of $103,496.68 was expended by plaintiff during the calendar year 1916 for additions and betterments necessary to maintain and perpetuate said Lehigh and Susquehanna Railroad and branches and to keep and maintain the same in good order and repair and fit for efficient use, under the terms of the said lease.

B. *For additions and betterments to Wilkes-Barre and Scranton Railroad, $2,507.35*

During the calendar year 1916 plaintiff was in possession of the Wilkes-Barre and Scranton Railroad, extending from a point called Minooka Junction, in Lackawanna County, Pennsylvania, to a point near Lackawanna Avenue, in the city of Scranton, as assignee of a lease from the Wilkes-Barre and Scranton Railroad to the Lehigh Coal and Navigation Company, dated May 1, 1888, the provisions of which lease and assignment, so far as they are pertinent to this cause, are as follows:

The term of the lease begins from and after the date thereof and runs from and during the continuance of the charter of the Wilkes-Barre and Scranton Railway Company, less one year, said charter being perpetual but subject to alteration and repeal by the Legislature of the State of Pennsylvania.

Under said lease and assignment plaintiff is required to well
12 and efficiently operate said railroad and all such extensions and additions as may be made thereto, at its own cost and risk, and to pay for the use of the same a monthly rental, which shall be equal to one-twelfth of six per cent on the cost of the demised premises as the same appears on the books of the lessor, plus all taxes, both on the demised premises and on the rent or revenue of the Wilkes-Barre and Scranton Railway Company. Plaintiff is also required to maintain and perpetuate said railroad and to keep and maintain the same in good order and repair and fit for efficient use, at its own cost and charges, and to so return and redeliver up the same at the termination of the lease, the lease stating that it is the true intent and meaning thereof that the demised premises shall be so worked and maintained by plaintiff as to secure the largest amount of revenue possible therefrom.

In addition, said lease provides that in case of any breach of covenant on the part of the lessee, its successors and assigns, and notice thereof given by the lessor, if the same cannot or shall not be fully compensated within a reasonable time thereafter, the lessor may, at its option, declare the lease to be terminated, and thereupon enter upon the property and premises as and for condition broken, and repossess itself thereof as of its old and former estate.

It is provided by the assignment that if, for any reason, the lease of the Lehigh and Susquehanna Railroad, referred to in "A" above, shall be terminated and said railroad shall revert to the Lehigh Coal and Navigation Company or its assigns, the possession and control of the Wikes-Barre and Scranton Railroad by plaintiff and the term of the contract for the possession of the same shall terminate, and it also shall revert to the Lehigh Coal and Navigation Company.

13 Said sum of $2,507.35 was expended by plaintiff during the calendar year 1916 for additions and betterments necessary to maintain and perpetuate said Wilkes-Barre and Scranton Railroad and to keep and maintain the same in good order and repair and fit for efficient use, under the terms of the aforesaid lease and assignment.

C. *For additions and betterments to Allentown Terminal Railroad, $232.31*

During the calendar year 1916, plaintiff was in possession, as tenant in common with the Philadelphia and Reading Railway Company, of the Allentown Terminal Railroad, located in the city of Allentown, Pennsylvania, and connecting with the Lehigh and Susquehanna Railroad and the Philadelphia and Reading Railway at that point, as assignee of the interest of the Lehigh Coal and Navigation Company under a lease from the Allentown Terminal Railroad Company, its owner, dated July 10, 1889, the provisions of which lease and assignment, so far as they are pertinent to this cause, are as follows:

The term of the lease begins from and after July 10, 1889, and runs for and during the term of nine hundred and ninety-nine years.

Under said lease, the lessees are required to keep and maintain said railroad and its appurtenances in good working order, and to return the same in equally good order to the lessor at the expiration of the lease, and to pay to the lessor for the use of the same the sum of $40,500 per year as rent. The lessees are also required to pay the cost of all permanent improvements which may be necessary or convenient for the operation, use or enjoyment of said railroad.

14 Under said lease and assignment, plaintiff is required to pay two-thirds of the rent, the cost of maintenance and the cost of permanent improvements, while its co-tenant is required to pay one-third thereof.

Under the terms of the said assignment, the interest of the plaintiff in said lease is to terminate upon the termination of the lease of the Lehigh and Susquehanna Railroad, referred to in "A" above.

Said sum of $232.31 was expended by plaintiff during the calendar year 1916 as its share of the cost of additions and betterments to said Allentown Railroad which were necessary for the operation and maintenance of said railroad in good working order.

D. *For additions and betterments to the Ogden Mine Railroad, $855.22*

During the calendar year 1916, plaintiff was in possession of the Ogden Mine Railroad, extending generally from Ogden mine, in the township of Sparta, Sussex County, New Jersey, to Nolan's Point, on Lake Hopatcong, in Dover Township, Morris Counyt, New Jersey, under a lease from the Ogden Mine Railroad Company, its owner, dated November 4, 1881, hte provisions of which so far as they are pertinent to this cause, are as follows:

The term of said lease is for nine hundred and ninety-nine years from the first day of January, 1882.

Under said lease, plaintiff is required to at all times maintain and keep said railroad and all its appurtenances in good repair and condition and in all respects fit for use as a railroad, and to use and operate the same as a railroad in accordance with the charter of the lessor, paying to the lessor, for the use of the same, a yearly rent of $22,500.

15 The lease contains a provision that if the plaintiff shall make default in the payment of the rent or shall fail to perform any of the covenants contained in the lease, within a reasonable time after request in writing so to do, then the lease may be terminated and declared forfeited and at an end, and the lessor may re-enter upon and repossess itself of the whole of said railroad.

Said sum of $855.22 was expended by plaintiff during the calendar year 1916 for additions and betterments to said railroad necessary to maintain and keep the same in good repair and condition and in all respects fit for use as a railroad.

E. *For additions and betterments to Dover and Rockaway Railroad, $6,967.23*

During the calendar year 1916, plaintiff was in possession of the Dover and Rockaway Railroad, extending from Port Oram, Morris County, New Jersey, to a point near Rockaway, Morris County, New Jersey, as successor to the interest of the Longwood Valley Railroad Company under a lease of said Dover and Rockaway Railroad to said Longwood Valley Railroad Company, dated April 26, 1881, as the result of the merger of said Longwood Valley Railroad Company with plaintiff on December 30, 1887. The provisions of said lease, so far as they are pertinent to this cause, are as follows:

The term of the lease runs for nine hundred and ninety-nine years from April 1, 1881. Under it plaintiff is required at all times to maintain and keep the said railroad and all its appurtenances in good repair and condition and in all respects fit for use as a railroad, and to use and operate the same as a railroad in accordance with the laws of New Jersey. Plaintiff is required
16 to pay rent, dividends at the rate of six per cent on the outstanding capital stock of the Dover and Rockaway Railroad Company, interest on its bonded indebtedness, and taxes assessed upon its property, franchises, earnings, traffic, and business, as well as the cost of maintaining its corporate existence.

The lease further provides that if plaintiff shall make default in the payment of the rent reserved by said lease, or in any of the payments therein covenanted to be made by it for a period of thirty days after the same shall have become due and shall have been demanded from it in writing, or shall fail to perform any of the other covenants in said lease on its part to be performed within a reasonable time after a request in writing to perform the same, the lessor may declare the lease forfeited and at an end, and re-enter upon and repossess itself of the whole of the demised premises.

Said sum of $6,967.23 was expended by plaintiff during the calendar year 1916 for additions and betterments to said Dover and Rockaway Railroad necessary to maintain and keep said railroad and its appurtenances in good repair and condition and fit for use as a railroad under the terms of the aforesaid lease.

F. *For construction of Pier (new) 9 and bulkhead, near the foot of Carlisle Street, New York, $1,525,308.72*

During the calendar year 1916, plaintiff was in possession of Pier (new) 9, near the foot of Carlisle Street, in the city of New York, as assignee of that portion of a lease made by the city of New York with the Lehigh Valley Railroad Company, dated January 13, 1914, as modified by a supplemental agreement dated March 14, 1914, covering Pier (new) 9. Under this lease, the city of New
17 York leased a plot of land under water near the foot of Carlisle Street, known as Pier (new) 9. The city agreed to condemn all the right, title, and intreest of private owners in Pier (old)

9 and in the bulkhead. Plaintiff agreed to defray the entire cost of such condemnation, including awards, fees of commissioners and experts, and all other necessary disbursements.

On the vesting of title in the city of New York of such property, the plaintiff agreed to at once proceed with the improvement of the waterfront, including the building of Pier (new) 9, a stone bulkhead wall and sheds on said pier and upon the marginal street, wharf or place extending inshore a distance of fifty feet from the bulkhead, including the filling in in the rear of the bulkhead and the paving of the marginal street, wharf or place extending from the bulkhead line inshore to the westerly line of West Street in the city of New York, in accordance with plans, specifications and estimates of cost approved by the engineer of the Department of Docks and Ferries of the city of New York.

Under said lease, plaintiff agreed to pay rent at the rate of 27½ cents per square foot per annum for the portion of the demised area not acquired from private owners and the sum of $1.00 per year for the property so acquired from private owners. The lease further provided that if the cost of the improvement—being the entire cost of the condemnation proceeding, including awards, fees of commissioners and experts and all other necessary disbursements taxed in connection therewith, together with the cost of improving the property, including the cost of building Pier (new) 9 and the bulkhead wall and the sheds to be erected on said pier and bulkhead and
18 on the marginal street, wharf or place adjacent thereto, the cost of filling in in the rear of said bulkhead and the paving of the marginal street—should be less than the sum of $2,750,000, plaintiff was to pay annually, in addition to the above amount, an amount which should be 5½ per cent on a sum which should be equal to the difference between the said sum of $2,750,000 and such entire cost; while, if the cost of the improvement should be more than the sum of $2,750,000, the plaintiff was to be credited upon the average annual rental for a term of thirty-nine years with an amount equal to 5½ per cent upon the difference between said cost and the said sum of $2,750,000. It was further provided that, in the event that 5½ per cent on said difference between the cost of said improvement and the sum of $2,750,000 should exceed the average annual rental for the land under water for the term of thirty-nine years, then the term of the lease should be extended for a period which should bear the same proportion to thirty-nine years as the amount of excess cost over the sum of $2,750,000, plus the amount upon which 5½ per cent is equal to the amount of rental for the land over that acquired from private owners should bear to $2,750,000.

The lease also provides that the piers, bulkhead, sheds and other improvements made or erected in accordance with its terms shall revert to and become the property of the city of New York at the expiration or sooner termination thereof. Under it, the plaintiff is required to keep and maintain the premises and the structures

thereon or to be erected thereon in good and sufficient repair and condition, at its own sole cost and expense, and do all painting and dredging.

The term of the lease is for ten years, subject to two re-
19 newals of ten years, and a further renewal of nine years or for such longer period as plaintiff may be entitled to in the event that the cost of the improvements exceed $2,750,000, the rent increasing 10 per cent at each renewal.

Under the lease the city may, at any time after ten years from the commencement thereof, terminate the same, but in case of such termination, the city is to pay such reasonable sum to plaintiff as may be fixed by arbitrators provided for in the lease. The lease also provides that in the event plaintiff fails to pay the rent for a space of ten days, or fails to perform, keep, do or observe any or either of the covenants, agreements, things, terms or conditions of the lease, the city may declare the lease at an end.

During the calendar year 1916, plaintiff expended the sum of $1,525,308.72 for the construction of Pier (new) 9 and bulkhead.

G. *For dredging at Pier 80, North River, $28.72*

During the calendar year 1916, plaintiff was in possession of Pier 80, at the foot of West 40th St., in the city of New York, under a lease from the city of New York dated August 17, 1909. The term of said lease is for ten years plus two renewals of ten years each, the rent during the first term being $18,900 and increasing at each renewal. Under the lease the city has the right to terminate it for plaintiff's failure to pay the rent or to observe the covenants or agreements in the lease.

Under this lease plaintiff is required to do such dredging as may be considered by the Commissioner of Docks of the city of New York necessary and proper to be done in the slips adjacent to said pier, and the city is specifically given the right to terminate the lease
20 upon plaintiff failing to do such dredging for a space of ten days after notice to do the same.

During the calendar year 1916 plaintiff expended for dredging the slip on the north side of Pier 80, N. R., $28.72, which dredging was considered necessary and proper to be done by the Commissioner of Docks of the city of New York.

H. *For dredging at Pier 46, North River, $38.10*

During the calendar year 1916, plaintiff was in possession of Pier 46, N. R., New York, under a lease from the city of New York dated May 19, 1915. The term of said lease is for ten years from October 24, 1914, and the rental is $43,762.95. The city has the right to terminate the lease upon plaintiff's failure to pay the rent reserved or to perform the covenants thereof.

Under said lease plaintiff is required to do such dredging as may be considered by the Commissioner of Docks necessary and proper to be done in the slips adjacent to said pier and the city is specifically given the right to terminate the lease upon plaintiff failing to do such dredging for a space of ten days after notice to do the same.

During the calendar year 1916, plaintiff expended the sum of $38.10 for dredging the slip on the north side of Pier 46, which said dredging was considered by the Commissioner of Docks necessary and proper to be done.

I. *For constructing an extension to Pier 46, North River, $14,486.22*

During the year 1916, plaintiff was in possession of an extension to Pier 46, North River, New York, under a lease from the city of New York, dated May 12, 1916. The term of said lease expires
21 October 25, 1924, and the rental is 27½ cents per square foot per annum for the area of land under water covered by said extension. The city has the right to terminate the lease upon plaintiff's failure to pay the rent reserved or to perform the covenants thereof.

Under this lease plaintiff is required to construct an extension to Pier 46 and a shed thereon under the direction and supervision of the chief engineer of the Department of Docks and Ferries of the city of New York, which revert to and become the property of the city of New York at the expiration or sooner termination of the lease.

During the calendar year 1916 plaintiff expended the sum of $14,486.22 in constructing said extension to Pier 46.

J. *For erection of extension Pier 39, N. R., $6,003.78*

During the year 1916, plaintiff was in possession of an extension to Pier 39, North River, New York, under a lease from the city of New York dated December 30, 1913, which lease granted plaintiff a term of ten years plus one extension of ten years at an annual rental of 27½ cents per square foot for the area of land under water occupied by said extension to said pier. The city has the right to terminate the lease upon plaintiff's failure to pay the rent reserved to perform the covenants thereof.

Under this lease plaintiff is required to build said extension at its own expense, but upon the expiration or sooner termination of the lease said extension is to revert to and become the property of the city of New York.

In accordance with the terms of this lease plaintiff expended during the year 1916 the sum of $6,003.78 for building the extension to Pier 39.

22 A detailed statement of such expenditures for additions and betterments is attached hereto marked "A."

7. If plaintiff is entitled to deduct from its gross income said expenditures amounting to $1,659,924.33 in addition to said deductions amounting to $30,112,403.68, its net income subject to tax under the provisions of the aforesaid act of Congress for the calendar year ended December 31, 1916, was $4,082,064.02, upon which amount the tax under the aforesaid act amounts to $81,641.28.

8. If plaintiff is not entitled to deduct said expenditures amounting to $1,659,924.33 in addition to said deductions amounting to $30,112,403.68, its net income assessable under the aforesaid act of Congress for the calendar year ended December 31, 1916, amounted to $5,741,988.35, upon which the tax provided by said act of Congress amounts to $114,839.77.

9. Defendant, as collector of internal revenue for the Fifth District of New Jersey, assessed the sum of $152,621.31 as taxes on plaintiff's income for the calendar year ended December 31, 1916.

10. Plaintiff paid to defendant said sum of $152,621.31, assessed as taxes on its income for the calendar year ended December 31, 1916, under duress and with protest and to avoid penalties threatened by the defendant, and said payment was not voluntarily made.

11. On March 8, 1918, plaintiff duly appealed to the Commissioner of Internal revenue from and on account of said assessment of $152,-621.31, and represented and claimed that $72,010.22 thereof was unlawful and should be refunded. No decision upon said appeal has been had or made by said commissioner, and such decision has been delayed more than six months from date of such appeal, and no part of said $72,010.22 has been repaid or refunded to
23 plaintiff; although on a computation later made said claim is now in reality for the sum of $70,980.03, instead of $72,-010.22, as originally claimed.

WM. A. BARKALOW,
Attorney for plaintiff.

ELMER H. GERAN,
United States Attorney, Attorney for Defendant,
By FREDERIC M. P. PEARSE,
Assistant United States Attorney.

Exhibit "A" to agreed statement of facts

Detailed statement of expenditures referred to in paragraph 6 of agreed statement of facts:

A. Additions and betterments to Lehigh & Susquehanna Railroad and branches:	
Renewing span, bridge 95, Wilkes-Barre	*$110.10*
Increase weight rail	34,625.56
Improved track material	1,533.03
Renewing west portion tunnel, White Haven	3,396.79
Additional & relocation tracks at Hope	524.50
Renewing bridge #4, Easton	*15,786.09*
Viaduct, Butler St., Wilkes-Barre	6,452.29
Renewing bridge #93, Ashley	12,178.36
Connecting up tracks in yard, Penobscot	68.86

A. Additions and betterments to Lehigh & Susquehanna Railroad and branches—Continued.		
	Siding for coal storage, Ashley	$774.48
	Additional yard tracks, Ashley	31,665.10
	Two signals on "hump," Allentown yard	109.27
	Changing signals on L. & S. Div	*34.17*
	Road crossing bell, Lehigh Gap	*117.62*
	Renewing flagging on leased property	112.51
	Extension siding, Northampton	195.28
	Telephone, Allentown yard	165.07
24	Coal storage near Nesquehoning	*698.41*
	Road crossing bell, Parsons	1,991.41
	Siding for Easton Merchanst Ice Co	8.83
	Rearrangement tracks for New Jersey Zinc Co	*95.62*
	Crossing bells, Northampton	10.08
	Tracks at Empire colliery, Wilkes-Barre	*94.70*
	Extension tool house, Walnutport	114.52
	Bell at public crossing, Lehigh Gap	1,068.81
	Telegraph line, Allentown yard	151.68
	Extension trainmen's building, Bethlehem Jct	351.58
	Siding for F. F. Jones & Son, Nanticoke	*69.84*
	Crossing bells, Catasauqua	92.82
	Yard tracks, Bethlehem Jct	4,583.12
	Renewing bridge 14, Ashley	200.00
	Bunk house, Bethlehem	648.87
	Additional track, Siegfried	1,618.96
	Alterations freight house, Easton	640.25
	Indicators, Miners Mill	314.63
	Relocation portion Cemetery St., Ashley	295.88
	Team track, Blackman St., Ashley	191.86
	Siding for Gerber Engineering Co., Beth. Jct	271.87
	Rest room for trainmen, Allentown	51.01
	Replacement train order signals, L. & S. Div	60.76
	Increase water supply facilities, Allentown yard	9,615.27
	Automatic signals, Newport St., Ashley	856.03
	Siding removed at tunnel	*306.10*
	Tracks for Lehigh & Wilkes-Barre Coal Co., Wanamie	3,636.90
	Siding for Faust Lubricating Co., Lee	*15.61*
	Crossover from siding to main track, Glendon	2,259.49
	Installing telephone line shop, Ashley	117.71
	Crossing bells, Park Ave., Wilkes-Barre	101.38
	Siding for Alliance Cement Block Co., Palmerton	22.17
	Extension gas siding, Bethlehem	238.09
25	Additional track, Nesquehoning Jct	1,058.82
	Total	$103,496.68
B. Additions and betterments to Wilkes-Barre and Scranton Railroad:		
	Renewing bridge 60, Scranton	$10.85
	Passenger station, retaining wall, etc., Scranton	1,833.88
	Increase weight rail	662.62
	Total	$2,507.35
C. Additions and betterments to Allentown Railroad:		
	Improved track material	*22.51*
	Interchange tracks L. V. R. R., Allentown	457.11
	Siding for M. J. Egan	50.75
	Rest house for dining car crew, Allentown	23.60
	Rearrangement tracks, station	1.50
	Rearrangement tracks, West End Terminal	*2,889.89*
	Additional term delivery tracks, Allentown	*161.88*
	Resetting curb & paving, 3rd St., Allentown	*27.50*
	Land at Allentown	2,801.13
	Total	$232.31

NOTE.—Figures in italic are in red ink in copy.

D. Additions and betterments to Ogden Mine Railroad:	
Telephone despatching system, Ogden Mine R. R	$182.23
Land at Lake Hopatcong	672.99
Total	$855.22
26 E. Additions and betterments to Dover & Rockaway Railroad:	
Telephone despatching system, Dover & Rockaway R. R	1,244.01
Renewing bridge 278, Dover	4,881.27
Increase weight rail	84.37
Improved track material	68.80
Siding for N. J. Power & Electric Light Co., Dover	688.78
Total	$6,967.23
F. J. Piers, New York City:	
New Pier 9 and bulkhead	1,525,308.72
Dredging north side Pier 80	28.72
" " " " 46	38.10
Extension to Pier 46	14,486.22
Extension Pier 39	6,003.78
Total	$1,545,865.54

27 In United States District Court

[Title omitted.]

Finding of Facts. Filed April 12, 1922

The court finds the following facts:

1. That plaintiff is and was a corporation organized and existing under the laws of New Jersey and that the defendant is and was the collector of internal revenue of the United States for the Fifth District of New Jersey, as set up in paragraphs 1 and 2 of the agreed statement of facts.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

2. That plaintiff's gross income for the calendar year ended December 31, 1916, was $35,854,392.03.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

28 3. That under and by virtue of the act of Congress entitled "An act to increase the revenue and for other purposes," approved September 8, 1916, plaintiff was entitled to deduct from its gross income $30,112,403.68.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

4. That within the year 1916 plaintiff expended the amounts, aggregating $1,659,924.33, mentioned in paragraph 6 of the agreed

statement of facts, for the purposes and under the circumstances therein mentioned.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

5. That the amount mentioned in paragraph 6 of the agreed statement of facts, and each of them, were rentals or other payments required to be made as a condition to the continued use or possession of property to which plaintiff had not taken or was not taking title.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

6. That within the calendar year ended December 31, 1916, plaintiff was required to expend and expended the sum of $1,659,924.33 as a condition to the continued use or possession of property to which it had not taken or was not taking title, which sum is not included in the deductions aggregating $30,112,403.68 mentioned in paragraph 3.

29 Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

7. That plaintiff is entiled to deduct from its gross income for calendar year ended December 31, 1916, said expenditures amounting to $1,659,924.33 in addition to said deductions amounting to $30,112,403.68.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

8. The plaintiff's net income subject to tax under the provisions of the aforesaid act of Congress for the calendar year ended December 31, 1916, was $4,082,064.02.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

9. That defendant as collector of internal revenue for the Fifth District of New Jersey, assessed the sum of $152,621.31 as taxes on plaintiff's income for the calendar year ended December 31, 1916, which amount plaintiff paid to the defendant on June 15, 1917, under duress and with protest and to avoid penalties threatened by the defendant and said payment was not voluntarily made.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

10. That on March 8, 1919, plaintiff duly appealed to the Commissioner of Internal Revenue from and on account of said assess-

ment of $152,621.31 and represented and claimed that
30 $72,010.22 thereof was unlawful and should be refunded and that no decision upon said appeal has been had or made by said commissioner and that such decision was delayed more than six months from the date of said appeal prior to the institution of this suit.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

11. That the tax so assessed by defendant against plaintiff and paid by it on its income for the calendar year ended December 31, 1916, exceeded the tax lawfully due by $70,980.03.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

12. That plaintiff is entiled to judgment against the defendant for said sum of $70,980.03, together with interest thereon at 6 per cent from June 15, 1917.

Defendant's counsel prays an exception to the court's finding and an exception is allowed and sealed accordingly.

J. L. BODINE, *Judge.*

31 In United States District Court

[Title omitted.]

Judgment. Filed April 12, 1922

This cause being regularly on the list for trial at the April term, 1922, of this court and both parties, by consent in writing duly filed with the clerk of this court, having waived trial by jury and consented that the issues be tried by the court, and the cause being called on April 5, 1922, and the plaintiff appearing by Charles E. Miller, its counsel, and the defendant appearing by Frederic M. P. Pearse, his counsel, and the parties having submitted the cause to the court upon an agreed statement of facts and the court having found that the plaintiff is entitled to judgment against the defendant in the sum of $70,980.03, together with interest thereon at the rate of 6 per cent from June 15, 1917;

It is thereon upon this 12th day of April, 1922,

Ordered, that judgment final be entered against said defendant and in favor of said plaintiff in the sum of ninety-one thou-
32 sand eight hundred and twelve dollars and sixty-six cents ($91,812.66), and that said plaintiff recover the costs of this suit to be taxed.

J. L. BODINE, *Judge.*

On motion of
CHARLES E. MILLER,
Of Counsel for Plaintiff.

33 In United States District Court

[Title omitted.]

Petition for and order allowing writ of error. Filed July 20, 1922

To the honorable judges of the United States District Court for the District of New Jersey:

And now comes Charles V. Duffy, former collector of internal revenue of the United States for the Fifth District of New Jersey, defendant in the above-entitled cause, by Walter G. Winne, United States attorney for the District of New Jersey, and Frederic M. P. Pearse, assistant United States attorney, and says that on the 12th day of April, 1922, the court entered judgment herein against defendant (said cause having been tried before the court without a jury on an agreed statement of facts) for the sum of ninety-one thousand eight hundred twelve dollars and sixty-six cents ($91,812.66), in which final judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in the assignment of errors which is filed with this petition.

34 Wherefore the defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Third Circuit for the correction of the errors so complained of and that a transcript of the record of the proceeding and papers in this cause duly authenticated may be sent to the said court.

WALTER G. WINNE,
United States Attorney.
FREDERIC M. P. PEARSE,
Asst. U. S. Attorney.
Attorneys for the Defendant, (Plaintiff-in-Error.)

35 [Title omitted.]

This 20th day of July, 1922, came the defendant, Charles V. Duffy, former collector of internal revenue of the United States for the Fifth District of New Jersey, by Frederic M. P. Pearse, assistant United States attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by him; praying also that the transcript of record and proceedings and papers, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court has allowed the writ of error.

J. L. BODINE, *Judge.*

36 In United States District Court

[Title omitted.]

Assignments of error. Filed July 20, 1922

And said Charles V. Duffy, collector of internal revenue of the United States for the Fifth District of New Jersey, defendant and plaintiff-in-error, by Walter G. Winne, United States attorney, and Frederic M. P. Pearse, assistant United States attorney, comes and says that in the record and proceedings and also in the matter contained in the bill of exceptions and in the refusal of the court to find the facts as requested by the defendant in said cause by the said District Court of the United States for the District of New Jersey, there is manifest error in this, to wit:

1. The court erred in rendering final judgment for the plaintiff instead of for the defendant.

2. The conclusions of the court on the findings of fact should have been in favor of the defendant instead of in favor of the plaintiff.

37 3. The court erred on the conclusions of law in finding for and allowing a final judgment to be entered in favor of the plaintiff instead of the defendant.

4. The agreed statement of facts shows that plaintiff had no cause of action and that final judgment should have been entered in favor of the defendant instead of in favor of the plaintiff.

WALTER G. WINNE,
United States Attorney.
FREDERIC M. P. PEARSE,
Asst. U. S. Atttorney.
Attorneys for the Defendant, (Plaintiff-in-Error.)

38 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1922

CHARLES V. DUFFY, COLLECTOR, PLAINTIFF in error,
vs.
CENTRAL RAILROAD OF NEW JERSEY, DEFENDANT in error.
No. 2925.

Argument and submission

And afterwards, to wit, this 15th day of December, 1922, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Warren Davis, circuit judges, and the court not being fully ad-

vised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the third day of May, 1923, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

39 In the United States Circuit Court of Appeals

[Title omitted.]

Opinion. Filed May 3, 1923

Before Buffington, Woolley, and Davis, Circuit Judges.

DAVIS, Circuit Judge:

This action was instituted by the Central Railroad Company of New Jersey against Charles V. Duffy, collector of internal revenue of the United States for the Fifth District of New Jersey, to recover $72,010.22 with interest from June 15, 1917, paid under protest on assessment made for the taxable year of 1916. The case was tried to the court without a jury on an agreed statement of facts and judgment was rendered for the complainant for $70,980.03 with interest. Of this amount defendant concedes that complainant is entitled to recover $37,781.54.

The gross income of the railroad for 1916 was $35,854,392.03, from which it was conceded that there should be deducted as maintenance and operating expenses $30,112,403.68, leaving a net income of $5,741,988.35. From this amount complainant contends that there should be a further deduction of $1,659,924.33 spent for (1) additions and betterments to leased railroads and branches, (2) construction of, and extensions to, piers, and (3) dredging at piers. If these deductions are made, it would reduce the net income of the railroad from $5,741,988.35 to $4,082,064.02, and the taxes of $70,980.03 paid on the $1,659,924.33 should be allowed complainant. These allowances from the gross earnings must be made, if at all, under the following provision of the act of September 8, 1916:

"SEC. 12 (a). In the case of a corporation, joint stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources:

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property, to which the corporation has not taken or is not taking title, or in which it has no equity."

It is admitted that the complainant was in possession of these properties under leases, in some cases for long terms, and that
40 it has no equity in them, had not taken, and was not taking title to them and the expenditures were made within the year 1916. The real question is whether these expenditures, aggre-

gating $1,659,924.33, were, as defendant contends, "capital expenditures" or were, as complainant contends, ordinary and necessary expenses and rentals paid within the year, as a condition to the continued use and possession of the properties in question. If these expenditures belong to the former class, they are not deductible; if to the latter, they are.

The Central Railroad held the Lehigh and Susquehanna Railroad and its branches under a lease whose term began April 1, 1871, and extends not beyond 999 years from November 4, 1868, less one day. Under the terms of the lease, the complainant was "required to maintain and perpetuate said railroad and branches and to maintain and keep the same in good order and repair and fit for efficient use at its own cost and charges," and "to well and efficiently operate said railroad," it being "the true intent and meaning (of the lease) that the demised premises shall be so worked and maintained by the plaintiff as to secure the largest amount of revenue possible therefrom." For such work and materials as were required for repairing, renewing, improving, and increasing weight of rails, yard tracks, water supply facilities, bridges, equipment, and facilities, generally called "additions and betterments," the Central Railroad spent $103,496.68. It was admitted that this sum "was expended by plaintiff during the calendar year 1916 for additions and betterments necessary to maintain and perpetuate said Lehigh and Susquehanna Railroad and branches and to keep and maintain the same in good order and repair and fit for efficient use, under the terms of the said lease."

The Central Railroad was in possession of the Wilkes-Barre and Scranton Railroad by virtue of a lease which is dated May 1, 1888, and runs during the life of the charter less one day. This lease contains the same covenants as to operation and efficiency as does the lease in the case of the Lehigh and Susquehanna Railroad and in addition provides that if the covenants are broken and not performed upon notice and if the covenants in the lease of the Lehigh and Susquehanna Railroad are broken and that road reverts to the lessor, the Wilkes-Barre and Scranton Railroad shall also revert to the lessor. The complainant expended on building or renewing a station and retaining wall and bridge at Scranton $2,507.35. It was admitted that this money was expended in the year 1916 for "additions and betterments necessary to maintain and perpetuate said Wilkes-Barre and Scranton Railroad and to keep and maintain the same in good order and repair and fit for efficient use, under the terms of the aforesaid lease."

41

The complainant was in possession, as tenant in common with the Philadelphia and Reading Railroad Company, of the Allentown Terminal Railway under a lease for 999 years from July 10, 1889. The lease contained practically the same covenants as did the other two leases. The Central Railroad spent $232.31 as its share on improvements, interchange and rearrangement of tracks, etc. It was admitted that this amount was spent in 1916 "as its share of

the cost of additions and betterments to said Allentown Railroad which were necessary for the operation and maintenance of said railroad in good working order."

During the year 1916 complainant held Ogden Mine Railroad, within the State of New Jersey, for a term of 999 years. Under the terms of the lease, complainant is "required to at all times maintain and keep said railroad and all its appurtenances in good repair and condition and in all respects fit for use as a railroad." The lease further provides that if the complainant "shall fail to perform any of the covenants contained in the lease, within a reasonable time after request in writing so to do, then the lease may be terminated and declared forfeited and at an end."

It was admitted that $855.22 was expended by complainant in 1916 "for additions and betterments to said railroad necessary to maintain and keep the same in good repair and condition and in all respects fit for use as a railroad."

The complainant in 1916 was in possession of the Dover and Rockaway Railway under a lease dated April 26, 1881, for 999 years from April 1, 1881. The lease provided that "plaintiff is required at all times to maintain and keep the said railroad and all its appurtenances in good repair and condition and in all respects fit for use as a railway." $6,966.23 was spent in installing a telephone system on the road, renewing a bridge at Dover, increasing weight of rails and improving track material. It was admitted that these expenses were "for additions and betterments to said Dover and Rockaway Railway necessary to maintain and keep said railway and its appurtenances in good repair and in condition in all respects fit for use as a railway under the terms of the aforesaid lease."

New York City entered into a lease, for what is known as Pier 9 in that city at the foot of Carlisle Street, with the Lehigh Valley Railroad Company, dated January 13, 1914, and assigned it to the complainant. The city covenanted to condemn all the inter-
42 est of private owners in Pier (old) 9 and the complainant agreed to pay the entire cost of condemnation and to build, and in pursuance thereof did build, Pier (new) 9, a stone bulkhead wall, sheds on the pier, and a wharf extending fifty feet inshore from the bulkhead. It agreed to pay rent at the annual rate of 27½ cents per square foot for that portion not acquired, and $1.00 for that portion acquired, from private owners. The lease also provided if the entire cost of condemnation and improvements to the complainant was less than $2,750,000, it was to pay in addition 5½ per cent on the difference between the $2,750,000, and the actual cost, but if the cost was more than $2,750,000 the complainant was to be credited on its average annual rental with 5½ per cent on the difference for a term of thirty-nine years, the lease otherwise being for a term of ten years. The lease contained other provisions, under certain contingencies not here material, for the extension of the term. The city could terminate the lease at any time, if complainant failed

to perform any of its covenants. In 1916, complainant spent in the work provided for by the lease $1,525,308.72.

Complainant was in possession of Pier 80 at the foot of West 40th Street and Pier 46, North River, in 1916, in New York City, under leases for a ten-year term from the city. Under these leases complainant was required to do such dredging as the Commissioner of Docks of the city considered necessary. Complainant did dredging which the commissioner considered necessary and for which it spent $28.72 on the one and $38.10 on the other. The leases provided that the city could terminate them if complainant failed to observe their covenants.

Under two other leases from the city complainant was in possession of extensions to Piers 39 and 46, North River. These leases required the complainant to build extensions to these piers, and in so doing it spent $6,003.78 and $14,486.22 on each extension respectively. If complainant failed to perform the covenants of the leases, the city had the right to terminate them.

All these various properties, of which the Central Railroad was in possession under leases and on which it expended the $1,659,924.33, with their improvements, temporary and permanent, with their "additions and betterments," revert to the lessors upon the expiration or termination of the leases.

Were these expenditures ordinary and necessary expenses paid within the year 1916 as a condition to the continued use and possession of the properties? The force and effect of the pro-
43 visions of the lease and of the stipulated facts require an affirmative answer to this question. Article 140 of the Regulations 33 provides that:

"The cost of erecting permanent improvements on ground leased by a company, is held to be an additional rental and is therefore a proper deduction from gross income, provided such buildings and improvements, under the terms of the lease, revert to the owner of the ground at the expiration of the lease. In such case, however, the cost will be prorated according to the number of years constituting the term of the lease and the annual deduction will be an aliquot part of such cost."

This regulation is the interpretation of the statute by the department to which its endorsement is entrusted. It is conceded by both parties that the expenditures for these improvements are "additional rentals." Consequently the expenditures should be deducted from the gross income in order to ascertain the net income on which the tax must be paid. The real question is as to the time when the deductions should be made. The Government contends that they should be prorated in each case according to the number of years constituting the lease and that an aliquot part only should be deducted annually. The complainant, on the other hand, contends that they are rentals paid within the year 1916 as a condition to the continued use and possession of the prop-

erties and should be deducted for that year. A regulation of a Governmental department charged with the inforcement of an act has the force and effect of law, unless in itself it is unreasonable, inappropriate, and inconsistent with express statutory provision. United States v. Morehead, 243 U. S. 607, 613; Maryland Casualty Co. v. United States, 251 U. S. 342, 349. The question is reduced to this: Is the insistence that these expenditures be prorated in each case according to the number of years constituting the term of the lease and that the aliquot part be deducted annually, inconsistent with the express provisions of the statute? The statute expressly provides that all such rentals "paid within the year" may be deducted "from the gross amount of income received within the year" in order to ascertain the net income to be taxed. The evident intention of the statute is that the deduction of such rentals shall be made from the gross income "within the year" in which they were paid. McCoach v. Minehill Railway Co., 228 U. S. 295, 304. There is no hint in the statute that they shall be prorated over the term of years of the lease. We think that the provisions of the statute are plain, but if there be doubt, that doubt must be resolved against the Government. Gould v. Gould, 245 U. S. 151. That part of the regulation providing that only an aliquot part of such rentals shall be deducted each year during the life of the lease, we think, is inconsistent with the plain provisions of the statute and therefore the decree of the District Court is Affirmed.

[File endorsement omitted.]

44 In United States Circuit Court of Appeals

[Title omitted.]

Judgment. Filed May 3, 1923

In error to the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

J. WARREN DAVIS,
Circuit Judge.

PHILADELPHIA, May 3, 1923.

[File endorsement omitted.]

45 [Title omitted.]

Greeting:

Whereas, lately in the District Court of the United States for the District of New Jersey, before you or some of you, in a cause between Charles V. Duffy, collector of internal revenue (defendant

below), plaintiff in error, and the Central Railroad Company of New Jersey (plaintiff below), defendant in error, a judgment was entered in the said District Court on the twelfth day of April, 1922, which judgment is of record in the office of the clerk of the said District Court to which reference is hereby made and the
46 same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a writ of error, agreeably to the act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-two, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

PHILADELPHIA, May 3, 1923.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the fourth day of June, in the year of our Lord one thousand nine hundred and twenty-three (1923).

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[File endorsement omitted.]

47 In United States Circuit Court of Appeals

Clerk's certificate

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of Charles V. Duffy, collector, plaintiff in error, vs. Central Railroad of New Jersey, defendant in error, on file, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this ninth day of July, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the United States the one hundred and forty-eighth.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

48 *Writ of certiorari and return. Filed*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Being informed that there is now pending before you a suit in which Charles V. Duffy, collector of internal revenue of the United States for the Fifth District of New Jersey, is plaintiff in error, and the Central Railroad Company of New Jersey is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
49 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the seventeenth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

50 [Title omitted.]

Stipulation as to return to writ of certiorari

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Third Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Scolicitor General.
CHARLES E. MILLER,
Counsel for Respondent.

OCTOBER 19, 1923.

[File indorsement omitted.]

51 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation as to return to writ of certiorari in the case of Charles V. Duffy, collector, plaintiff in error, vs. Central Railroad Company of New Jersey, defendant in error, No. 2925, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 15th day of November, in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the United States the one hundred and forty-eighth.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

52 [File indorsement omitted.]

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924